

# Change Order Process – Internal Staff

March 31, 2009

## **Part 1**

Under FAR Part 43, it is the policy of the Government to forward price all contract changes prior to their execution. Unless it cannot be done so without adversely affecting the Government's interest.

The purpose of a *change order* is to change the contract so the contractor can do the work and to get funds obligated to cover that work. Some reasons why you would issue a change order rather than a bilateral (or unilateral) contract modification can be:

- ☐ The work needs to start immediately in order to protect the public or the Government's interest, e.g. a slope that slumps and deposits a large amount of material on the roadway. You know that you need to get the material off the road, but you do not know what the solution will be to stabilize the slope.
- ☐ The work cannot be defined fully at the time it needs to start. An example might be where soft spots in the grade develop after removing the existing pavement. You have not determined the full extent of the problem, but need to get started digging the known ones out.
- ☐ Work has to start before you have a proposal from the contractor or negotiations are completed. A common situation is where the contractor is dragging his feet in submitting a proposal.

The process developed here is kind of a cross between a letter contract and the obligation CM's we do at the end of the fiscal year to hold funds for known needs. In all cases, a change order will be followed up with contract modification. Ideally it will be a forward priced, bilateral contract modification. The objective is to get the contract modification completed before the contractor has completed a substantial part of the work. Otherwise you may end up having to do a post priced contract modification.

## **Situation**

- ☐ You are working on a FH project in Oregon, awarded 1/14/09, multiple funding sources.
- ☐ The contractor is doing excavation work in the Sta. 120+00 to 140+00 area.
- ☐ A subsurface spring is discovered between Sta. 126+50 to 131+50 Lt.
- ☐ The contract has no item for underdrains
- ☐ The fixed completion date is 9/15/2011
- ☐ The contractor cannot shift their work efforts to another part of the project without incurring additional costs
- ☐ Delaying work would cause the cost to the Government to increase dramatically (i.e. adversely affecting the Government's interest).

## **Process**

1. Call your COE. Discuss the situation. Develop a rough estimate of costs. In our example, the estimate comes to \$51,000. This may be for the entire fix or for a portion of it. If you need to get technical experts involved or have to expand the construction limits, you might only request funds to do part of the work. In the case of a slide, you might only request enough funds to clear the road and reestablish traffic.

You or the COE should write up brief memo explaining why the change order needs to be done and what the scope of it appears to be. You want enough info to ensure the CO who has to sign the change order understands the situation.

2. Fill out a PR and submit it using the standard process.
3. Call the PR preparer and the Program Manager (or their backup). In our example this is a Forest Highway (F15) with some Aquatic Organism Passage (F18) funds on it. Your goal is to get the PR signed that day or within 24 hours. You want someone to “bird dog” the PR and Change Order for you in WFL. This could be done by your COE or Wendy Gregg.
4. Fill out an SF-30. See attached CM #011.
  - a. **Boxes 1-12** are filled out like any other CM you would typically do. Use the next available CM number you have. In this case it is **#011**. We do not want to create a separate numbering system for change orders.
  - b. **Box 13A** is checked. Authority for issuing a Change Order will be the Changes Clause, FAR 52.243-4.
  - c. **Box 13E** is checked “**is not**”
5. Box 14. Remove the standard release statement (you may have to manually cross it out, the eforms are not very user friendly). On the WFLHD public website, you can access a SF30 without the release language,  
[http://www.wfl.fhwa.dot.gov/other/it/forms/sf30\\_contract.pdf](http://www.wfl.fhwa.dot.gov/other/it/forms/sf30_contract.pdf).

Insert the following: **“This change order directs the contractor to begin work as described on the following pages. A successor contract modification will further definitize work items, prices, and time impacts”.**

6. Fill out the SF-30a like a typical CM. In this example, multiple fund sources are going to pay for the work.

7. **Box 14.** Tell the contractor what you want them to do. In the example, you want them to install an underdrain system and modify the culver inlet. You know what the underdrain will look like, but you're not sure about the culvert inlet. Always include the sentence: **"The contractor is to track and segregate costs associated with this work"**. What usually works best is to complete separate dailies (form WFLHD 465) for the work being do under the change order.
8. Attach any drawings, specifications, or sketches that will help define the work.
9. In most situations you will not need to do a WFLHD 10 form for a Change Order. If you think you do need one, discuss it with your COE.
10. Fax the Change Order to the appropriate level Contracting Officer for signature. This one is over \$50,000 so it goes to the Construction Engineer.
11. The Contracting Officer will sign it, **blank** out the dollar amounts, and fax it back to you. They will put a copy in the mail to the contractor. The CO will take care of the WFL internal routing of the Change Order.
12. The project engineer or construction management PM will give contractor's superintendent (or whoever is their onsite project chief) a copy of the Change Order. Ideally, this should all be done within 24 hours (no, I'm not smoking some funny tobacco).

The contractor will start the work. You will start developing a more detailed scope of work and an IGE. You will send the contractor a letter requesting a price proposal from him for the work. You will follow the process in Chapter 10 of the WFLHD Construction Manual.

## **Part 2**

According to FAR Part 43.204(b)(1), "...shall negotiate equitable adjustments resulting from change orders in the shortest practicable time." In other words, you need to follow up with a supplement agreement (contract modification) that is ideally bilateral.

You now need to definitize the Change Order with a more detailed contract modification. There are two examples of the definitizing contract modification for the change order detailed in Part 1 attached. The first one (Version #1 of CM #012) is for the situation where you have an excess of funds. In other words, the actual price of the CM is less than the amount you requested for the Change Order. The second one (Version #2 of CM #012) is where you need addition funds.

You will do these like any CM you typically do. I have left out most of the steps here for the sake of brevity. That does not mean they are to be skipped. The IGE, contractor's

proposal, price memorandum, PR, and negotiations have all taken place and now you're doing the forms.

#### Version #1

You and the contractor have reached an agreement (the negotiating class you took has paid off). You now need to fill out the contract modification.

1. Fill out the modification using the next available number. In the example it is CM #012.
2. Check **Box 13C** and insert the applicable FAR clause. In the example, it was determined that this was a differing site condition.
3. **Box 13E**. Since this will be a bilateral CM, the contractor **"is required to sign this document and return 2 copies to the issuing office"**.
4. **Box 14**. Use the standard release statement.
5. **Box 16A**. The net value of this CM is under \$50,000. So the COE can sign.
6. SF 30a. Fill out as typically done. Include the dollar amounts along with the account numbers. In Version #1, the amounts are negative.
7. You and the contractor determined that extra contract time would be needed to complete the work. Seven days was added to the contract.
8. You added specifications to cover the work and materials. I have abbreviated them here.
9. You added a WFLHD 10 form with the new contract items.
10. You deobligate the \$51,000 from CM #011, the Change Order, to pay for CM #012.
11. You add a note to the contractor explaining what is being done. The negative dollar amount at the bottom of the page will probably confuse them. (Heck, it confuses us in WFL sometimes!).
12. Submit a price negotiation memorandum for approval to your COE.
13. Give a courtesy call to the Program Manager(s) to let them know they will be getting some money back. In this example it is \$2,325.00 that will be available for other uses (help award other projects or pay for future contract mods.)

## Version #2

In Version #2, you didn't quite hit the nail on the head with your rough price estimate (or dozed a bit during the negotiating class we sent you to). You will need additional funds. The CM looks the same except the SF 30a will show a positive amount in **Box 12**. The WFLHD 10 will also show positive amounts. The amount needed is over and above the \$51,000 you got from the change order.

1. Submit a PR for additional funds. It will be for \$23,875.00
2. Everything else is the same as Version #1. Since the net amount of the CM is still under \$50,000, the COE can sign it.
3. The aggregate amount is under \$650,000 ( $51,000 + 74,875$ ) cost or pricing data is not required.

## **Part 3**

This part is focused mainly for the COE's and the Construction Engineer. It set up to answer questions or deal with special situations. As with most things in Government contracting, this part will not cover all the possible situations that may come up.

**Question #1. Can progress payments for the work be made to the contractor between the issuance of the change order, but before the definitizing contract modification is completed.**

Answer. Yes they can be. There will be legitimate situations where you will want to do this. In general, however, you will want to minimize this because it will take the pressure off the contractor to get his proposal in. It could also give the project staff an excuse not to complete the contract modification package timely. In most situations there should only be one or two such payments.

You would treat it like a partial payment as per Section 109.08(f). This includes preparatory work or materials on hand. Get sufficient documentation to satisfy you as to the costs incurred.

For the attached examples, use the following language on the progress estimate:

<b>MOH CM011</b>	<b>Preparatory work for Change Order, underdrain system</b>
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In the notes section of the progress estimate program, the project engineer should describe what is being paid for. For this example, it might be for the purchase of the underdrain pipe, some survey work, and traffic control.

The advance payments will be zeroed out after the definitizing contract modification is signed and the items covered by the advance are incorporated into the work.

**Question #2. Can I use or insert a “not to exceed” (NTE) amount in the change order as a way to cap the amount of work (or liability to the government) the contractor can do before the definitizing contract modification is done.**

Answer. Yes. In letter contracts, this amount is usually no more than 50% of the independent government estimate for the project or enough to cover the expected mobilization costs. These would be good guidelines to follow if you want to do this.

You could also estimate what costs they should reasonably incur before the contract modification is signed. Use this figure as your “no to exceed” amount. This would be allowable provided the time duration is not more than a couple of progress estimate cycles.

If you elect to do this, you may run into a situation where the contractor says he has incurred costs up to the “no to exceed” limit. He would have the right to stop work until you raised the amount. This would require a change order. A “no to exceed” amount can be a useful tool or a headache if applied in the wrong situation.

**Question #3. Can I use or insert a date in the change order for when the definitizing contract modification will be done?**

Answer. Yes. This may be a method to encourage the contractor to get his proposal submitted timely and your staff to work diligently.

There is a drawback to doing this. If the date is not met for issuing the definitizing contract modification, the contractor would not be obligated to continue working on the change order work without an extension. The extension would be another change order – more paperwork. If the contractor elected to continue working, you would be in a position of not being able to pay him for the work after the date in the change order.

Ideally the definitizing contract modification should be issued within 30 days of the change order. This may not be realistic on complex changes that involve several technical specialties or outside permitting agencies.

**Question #4. Do I need legal review for change orders with a net amount over \$500,000.00 ?**

Answer. Yes.

TAM 1204.7003(b) does not give us leeway to waive this on a change order. The best way to avoid this is to limit your change orders to less than this amount. It will mean that a second PR will be needed in order to secure funding for the full definitizing contract modification.

**Question #5. Do I need to get Cost or Pricing data for change orders with an aggregate amount exceeding \$650,000.00 (FAR 15.403)?**

Answer. No.

The contractor has not had time to submit a proposal to you at the time you are issuing the change order.

If you used the change order to delete some work and add replacement work, you could exceed the \$650,000 threshold. An example might be where you have a multiple culvert installation at a site. You have to change to a larger, single multiplate due to fish passage issues. You would delete the original work items and list the replace work. This might kick the aggregate amount over \$650,000. (Note: the net amount could be less than \$500,000 so it does not enter the realm of an automatic legal review.)

If the aggregate amount of the definitizing contract modification is over \$650,000 and an exemption does not apply, you will need cost or pricing data.

**Question #6. I can understand this process for an emergency situation or where the problem occurs suddenly and needs to be addressed quickly. What about where we are in negotiations on a forward priced contract modification, but the work needs to start before we have reached agreement? What do I do?**

Answer. You have two options here. You can issue a unilateral contract modification. This assumes that you are at deadlock in the negotiations. Doing this has some ramifications later on – such as a request for equitable adjustment or a post-priced contract modification.

Secondly, you could issue a change order directing the work to start. You do not need to include unit prices, but do need to include a description of the work, location(s), and any specifications you think are applicable. At this time you would already have a signed PR with account numbers. You, as COE, could issue it within your warrant limits. This might be a situation where you would want to include a NTE amount in the change order or a limiting date.

**Question #7. Can I give the contractor a written directive or a verbal order to do the work instead of a change order?**

Answer. No. You must give the contractor a written change order.

You, as a contracting officer acting within the limits of your warrant, could direct the contractor to start the work and inform them that change order is forthcoming. Generally you would only do this in an emergency situation or where the change order will be generated in the next 24 hours.

This could be done verbally and then followed with a faxed letter. You might need to do this if the contractor balks at starting the work without a change order or contract modification.



**Question #8. I'm a visual person, draw me a picture of the change order process.**

Answer.

